UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LEMOND CYCLING, INC.,

Plaintiff,

v.

TREK BICYCLE CORPORATION,

Defendant and Third-Party Plaintiff,

v.

GREG LEMOND,

Third-Party Defendant.

Case No. 08-CV-1010 (RHK-JSM)

TREK'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL ANSWERS TO INTERROGATORIES, TO DEEM FACTS ADMITTED, AND FOR EXPENSES

Trek submits this reply memorandum in support of Trek's motion to compel LeMond to comply with his discovery obligations and for expenses. Trek's discovery seeks to identify and narrow the scope of issues and evidence in dispute in this breach of contract lawsuit.

Introduction

The federal rules and case law call for specific and complete responses from LeMond, and support both the timing and the substance of Trek's requests. LeMond has not brought forth any contrary authority. Instead, LeMond attempts to disparage Trek's motives for filing the motion, while deflecting his own failures to comply with his obligations to respond to discovery requests. First, LeMond should give a complete and substantive response explaining which facts he contends support his claims. Now that fact discovery has closed, LeMond cannot rest on his pleadings or refer generally to all discovery. Second, LeMond should be deemed to have admitted the authenticity of consumer and dealers emails and letters, as well as the blog posts, based upon LeMond's failure to respond appropriately or sufficiently to Trek's requests to admit. LeMond not only fails to address the authority cited by Trek, but LeMond's position is undercut by the inconsistent position he has taken on authenticity and foundation of email traffic—relying in his summary judgment motion on some of the very same email evidence Trek seeks to have admitted as authentic here.

Argument

I. LeMond's "Overly Broad and Unduly Burdensome" Objection to Trek's Contention Interrogatory No. 11 is Waived and, In Any Event, is Meritless.

Apparently conceding that LeMond's response (which referred generally to his pleadings and expert discovery) to Trek's contention interrogatory No. 11 is not a sufficient response, *e.g., Transclean Corp. v. Bridgewood Servs., Inc.*, 77 F. Supp. 2d 1045, 1062 (D. Minn. 1999), *aff'd in relevant part, vacated in part*, 290 F.3d 1364 (Fed. Cir. 2002), LeMond falls back on his untimely "overly broad and unduly burdensome" objection. The federal rules provide that objections "must be stated with specificity" and "any ground not stated in a timely objection is waived unless the court, for good cause, excuses such failure." Fed. R. Civ. P. 33(b)(4).

LeMond contends his objection was timely because, although he did not make a specific objection based on "overly broad and unduly burdensome" in his July 8, 2009 answer, he incorporated his General Objections. However, General Objection 7, the "overly broad, unduly burdensome" objection, is asserted with respect to requests that "are not limited in identifiable scope." (Ex. 2 to Stippich Decl., at 2-3). Because Trek's interrogatory explores specific contentions by LeMond himself, LeMond has no basis for invoking this General Objection.

Nor is LeMond's boilerplate objection valid in any event. *Mead Corp. v. Riverwood Natural Resources Corp.*, 145 F.R.D. 512, 515-16 (D. Minn. 1992). Trek is simply asking LeMond to identify the legal bases for his claims and the factual basis supporting them. Although LeMond seeks to distinguish the cases cited by Trek, such efforts miss the mark. Despite the breadth of the contention interrogatories in *Shqeirat*, seeking "all facts" and identities of individuals supplying such facts, the court rejected the notion that the requests were overly broad and unduly burdensome since they were focused on defendants' claims of probable cause and reasonable suspicion. *Shqeirat v. U.S. Airways Group, Inc.*, 2008 WL 4232018, *4 (D. Minn. Sept. 9, 2008). The Court further explained that defendants' responses were adequate since they: (1) identified the statutes that provided basis for the seizure and (2) directed plaintiffs to the facts set forth in specific documents they had identified in their response, namely the Airport Police Department Incident Report and witness statements. *Id.*

Similarly, Trek's request narrowly focuses on LeMond's specific allegations of breach of the Sublicense Agreement and LeMond's alleged factual basis for claiming a breach. Unlike the response served in *Shqeirat,* LeMond's response is merely boilerplate—referring to his pleadings and expert discovery generally. LeMond *does not*, like the response in *Shquirat*, specify any legal bases for his claims (contractual provisions or otherwise) and *does not* identify specific documents or other facts to support any legal claims.

LeMond similarly should identify which contentions he intends to pursue at trial and to identify the factual support for those contentions. *Mancini v. Insurance Corp. of New York*, 2009 WL 1765295, *1-3 (S.D. Cal. June 18, 2009) (responding party is more familiar with its own contentions and it is his burden to review the documents to identify where the answers can be found); *Transclean Corp.,* 77 F. Supp. 2d at 1062 (response cannot subject requester to "elusive guessing exercise").

II. LeMond's Belated Objection to Requests for Admissions Nos. 1 and 4 Regarding Authenticity is Likewise Meritless.

LeMond attempts to justify his refusal to admit the authenticity of consumer and dealer emails and letters, and internet blog postings by claiming that Trek somehow has not provided LeMond with information about the electronic messages necessary for him to formulate a response. First, LeMond's objection, again, is untimely. It was not raised in LeMond's June 8, 2009 response, which relied on only two objections: (1) it was Trek's burden to authenticate and (2) LeMond lacked knowledge of authenticity. Instead of addressing the authorities Trek cited as to why these objections were insufficient, LeMond now claims that Trek did not provide him with information about what the documents purport to be that his counsel requested at the "meet and confer." (LeMond Opp. at 8).

Not only is LeMond's objection untimely because it relies on information LeMond purportedly requested *after* his response was due, Fed. R. Civ. P. 36(a)(4) (a party claiming lack of knowledge as reason for failing to admit or deny can only do so "after it has made reasonably inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny"),[1] but it is contrary to the position LeMond's counsel took in "meet and confer" correspondence, namely that LeMond was only advancing this argument with respect to documents produced by "*third parties to this litigation.*"[2] Documents produced by third parties to this litigation are not the subject of this motion. *See, e.g.,* Trek's Request No. 7 (encompassing third-party produced documents). The documents at issue here were produced by Trek.

Moreover, LeMond's claim of ignorance about the documents rings hollow in light of the clear language of Trek's Request Nos. 1 and 4—asking simply that LeMond admit the bates numbered documents are authentic "Consumer and Dealer Emails and Letters" (*see* Instructions to Request No. 1 and Request No. 1) and authentic "Blog Posts" (*see* Instructions to Request No. 4 and Request No. 4). LeMond cites no authority for his assertion that either he or Trek must have personal knowledge of the identity of the consumer or dealer author of the email, letter or blog post (LeMond Opp. at 5) in order to admit to the authenticity or genuineness of these documents.[3] Rather, as the Eighth Circuit has stated:

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[1] LeMond provides no description of the inquiry he made pursuant to this requirement.

[2] *Compare* July 6, 2009 Stippich letter, Ex. 5 to Stippich Decl. (writing to recap parties' meet and confer and with respect to authentication that LeMond's position was "there are numerous documents and Trek should delineate those it intends to use at trial and what they purport to be.") *with* July 8, 2009 Robbins' letter, Ex. 6 to Stippich Decl. (clarifying that LeMond's position was "simply that Plaintiff is unable to authenticate thousands of pages of documents, *produced by third parties to this litigation,* without knowledge of what Trek believes the documents purport to be.").

[3] *Zenith Radio Corp. v. Matsushita Elec. Indus. Co*., 723 F.2d 238 (3d Cir. 1983*), rev'd on other grounds*, 475 U.S. 574 (1986), a lengthy case for which LeMond did not provide a pincite and which did not address requests for admissions, held a document can be authenticated by a party who is likely to know of the document's genuineness, *e.g.,* by responding in an interrogatory that it is a record kept in the ordinary course of business, sufficiently authenticates the document against all parties. *Id.* at 285. *Lorraine v. Markel American Ins. Co*., 241 F.R.D. 534, 554 (D. Md. 2007), addressed summary judgment motions in which "none of the documentary evidence [including e-mail correspondence] presented [was] authenticated by affidavit or otherwise," *id.* at 537, yet the court acknowledged that "[a]uthentication …can be accomplished … by taking advantage of Fed.R.Civ.P. 36, which permits a party to request that his or her opponent admit the 'genuineness of

> [A] custodian or 'other qualified witness' need not have personal knowledge regarding the creation of the document offered, or personally participate in its creation, or even know who actually recorded the information.

Resolution Trust Corp. v. Eason, Jr., 17 F.3d 1126, 1132 (8th Cir. 1994); *Silver-Krieger, Ltd. v. Nicon Warehouse*, 1986 WL 4311, **4–5 (D.N.J. Apr. 2, 1986) (citing Eighth Circuit case law). An extraordinary amount of business information is transmitted through emails and web portals, in addition to the traditional channels of phone calls and letters. Trek received significant consumer and dealer feedback through electronic media. If LeMond truly contended that any of them were not from a consumer or dealer, he had the opportunity to challenge this in depositions (instead of presuming authenticity) and to raise it in response to these requests. LeMond himself has freely relied upon the very same type of email and website evidence in his own discovery and summary judgment motion, *see, e.g,* LeMond's Mem. in Support of Summ. J., and Exhibits 19 and 20 to Robbins' Decl. Accordingly, his belated and unfounded objection to authenticity should not be permitted to stand. *Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co.*, 19 F.3d 431 (8th Cir. 1994); *Resolution Trust Corp.*., 17 F.3d at 1131 (conceding genuineness of documents satisfies the authentication requirement of Fed. R. Evid. 901).

Conclusion

Trek requests the Court find that LeMond has failed to sufficiently respond to its contention interrogatory and requests to admit and to grant the relief requested in Trek's motion, including awarding Trek its expenses and fees.

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documents.'" *Id.* at 554. *St. Lukes Cataract and Laser Institute v. Sanderson,* 2006 WL 1320242 (M.D. Fla., May 12, 2006), also does not address requests for admissions.

Dated: July 27, 2009 GASS WEBER MULLINS LLC

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